

ESTATE PLANNING FOR MILITARY MEMBERS

PART B

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ESTATE PLANNING FOR MILITARY MEMBERS

PART B

Outline of Instruction

I. INTRODUCTION.

II. SERVICEMEN'S GROUP LIFE INSURANCE (SGLI)

- A. Servicemen's Group Life Insurance (SGLI); 38 U.S.C. §§ 1965-1976; 38 C.F.R. Part 9; Veterans' Benefits Act of 1992, § 201. Office of SGLI (OSGLI), phone number: 1-800-419-1473.
- B. Importance of SGLI in Legal Assistance.
- C. SGLI is group term life insurance for members of the armed forces, purchased by the government from private insurers, and partially subsidized by the government.
- D. Soldiers Covered.
 - 1. Active Component.
 - a. Active duty soldiers are automatically insured for \$200,000 (\$250,000) unless they opt out in writing.
 - b. Soldier can elect lower coverage or no coverage by completing VA Form SGLV-8286.

2. Reserve Component.

a. Certain reservists are eligible for full-time coverage.

(1) Unit soldiers of the ARNG and USAR and –

(a) Unit soldier in pay status.

(b) Delayed entry soldiers.

(2) IRR or IMA soldiers attached for training in a non-pay status to units that are scheduled for at least 12 periods of IDT annually.

(3) Reservists who have completed 20 years of creditable service, but have not begun receiving retired pay.

b. Part-time coverage is also available during periods of AT and ADT.

E. Scope Of Coverage.

1. Insurability is guaranteed when first given the opportunity to elect SGLI. Thereafter, soldiers who desire to increase coverage may be subject to insurability determinations

2. Provides protection on active duty and for 120 days following separation. No premiums are required during this additional 120 day period. Soldier may convert to Veteran's Group Life Insurance (VGLI) within 120 days of separation.

3. Soldiers may lose entitlement to SGLI based on:
 - a. their duty status at time of death (e.g., if death occurs during extended AWOL or while serving term of confinement); or
 - b. other miscellaneous factors (e.g., following refusal to serve due to conscientious objector status or following conviction of certain serious crimes). See AR 608-2, paras. 2-5 and 2-7.
4. Cause of death, however, is not relevant to the payment of SGLI proceeds.
5. Soldiers may convert to Veterans Group Life Insurance (VGLI) within 120 days of separation. No person may carry a combined amount of SGLI and VGLI in excess of \$200,000 at any one time.
6. Amount is included in decedent's estate for purposes of federal estate tax, but generally exempt from the claims of creditors and other taxes, including federal income tax.
7. No loan, cash, paid-up, or extended insurance value.

F. Eligible Beneficiaries.

1. Any person or legal entity designated by the soldier on appropriate VA form (Active Component: VA Form SGLV-8286). SGLI Act gives service member absolute right to choose beneficiary. Ridgway v. Ridgway, 454 U.S. 46 (1981).
2. If no designation, or "By Law" designation, then proceeds are paid according to SGLI statute:
 - a. All to spouse, but if none, then
 - b. All to surviving children in equal shares (and descendants of deceased children, by representation), but if none, then
 - c. All to parents (equally divided), but if none, then

d. All to executor of soldier's estate, but if none, then

e. Next of kin under state law.

3. Avoid "By-Law" designation. "By Law" designations are no longer authorized within the Army. See AR 27-3, para 3-6b(1) (10 Sep 95); AR 600-8-1 (20 Oct 94).

4. SGLI definition of "parents" for purposes of beneficiary designations. Pursuant to 38 U.S.C. § 1965(9), the term "parent" is limited to the father/mother of a legitimate child, the father/mother of an adopted child, and mother of an illegitimate child. The father of an illegitimate child is considered the parent also, but only if

a. acknowledged in signed writing prior to death;

b. judicially decreed either to be the father or to provide support; or

c. proof of paternity is established from official records (e.g., birth, school or welfare records) which show that, with his knowledge, claimant was named father.

See Lanier v. Traub, 934 F.2d 287 (11th Cir. 1991) (Despite fact service member raised by stepfather, "by law" designation precluded stepfather from sharing in SGLI proceeds, which went to natural father and mother).

5. SGLI definition of "children" for purposes of beneficiary designations. Pursuant to 38 U.S.C. § 1965(8) the definition of "child" is limited to a legitimate child or a legally adopted child. An illegitimate child is also included within the term if the insured is the child's mother or, if the insured is the father, the relationship meets the requirements of para. a.(1) through a.(3), above.

G. Currency of Designation.

1. Soldiers should be cautioned to keep their SGLI form updated.
2. Ridgway v. Ridgway, 454 U.S. 46 (1981) (A spouse was designated by name on SGLI election form. Soldier did not change election following subsequent divorce; ex-spouse was entitled to all the proceeds).
3. Zawrotny v. Brewer, 978 F.2d 1204 (10th Cir. 1992), *cert. denied* 113 S.Ct. 1418 (1993). (Oklahoma statute stated that, by operation of law, divorce causes ex-spouse to lose all entitlement to life insurance proceeds on life of previous spouse. Court of Appeals held Oklahoma statute ineffective to change ex-spouse designation on SGLI form.).

H. Minors as Beneficiaries.

1. OSGLI will not pay to a minor (except a minor spouse).
2. Consider trustee (living or testamentary) or custodian under Uniform Gifts (Transfers) to Minors Act (UGMA/UTMA) as designated beneficiary for minor children. Such designation may avoid delay and expense in the payment of proceeds.
3. SGLI intended for minors may be designated by the soldier for placement in a trust; for placement in a custodianship under the Uniform Gifts or Uniform Transfers to Minors Act; or for outright gift (in which case a court must appoint a guardian or conservator to receive and maintain the proceeds). The following language is recommended for trust/custodianship SGLI beneficiary designations on the SGLV-8286 (Servicemen's Group Life Insurance Election and Certificate) (see AR 600-8-1, figures 11-12 to 11-14):

a. Testamentary Trust for Children:

- (1) "My trustee to fund a trust established for the benefit of my children under my will."

- (2) A soldier who wishes to designate a trustee under a trust established in a will (a testamentary trust) as a primary or contingent beneficiary will be advised that before completing the SGLV-8286, the soldier must have a will prepared that contains a trust, and the soldier must sign (execute) the will. The trust in the will may be established for minors or adults, regardless of their relationship, if any, to the soldier. The soldier will be further advised of the following--

(a) Advantages are--

- (i) The need and (related expense) of maintaining a surety bond may be waived in the will.
- (ii) The trustee can use the SGLI proceeds for the benefit of the minor for the period of time, and in the manner specified, in the will. Direct distribution of SGLI proceeds may be delayed beyond the 18th birthday of the minor (e.g., upon completion of college, or age 25, which ever occurs first).

(b) Disadvantages are--

- (i) The will, which might not have otherwise required probate (e.g., because of the small amount of other property in the soldier's estate), will have to be probated and the court will need to appoint the trustee before the designated trustee may receive the SGLI proceeds. Court and legal expenses will have to be paid.
- (ii) The distribution of SGLI proceeds will be delayed.
- (iii) There is no surety bond required that could protect the minor's funds from theft, fraud, waste, and other such acts by the trustee.

- b. The definition of "children" in the SGLI statute excludes stepchildren and certain illegitimate children. If any such children are intended beneficiaries, they should probably be included by name in the SGLI designation. For example, "... for the benefit of my children, including my stepchild, Mary Lamb,"

I. Settlement options.

- 1. Accelerated Death Benefits under SGLI/VGLI for servicemembers in terminal condition (within nine months of death).
- 2. Soldier may elect lump sum or 36 monthly installments.
- 3. If no election, beneficiary may elect type of settlement.
- 4. Alliance Account & financial services.

- J. Apply for benefits by submitting VA Form 29-8283, Claim for Death Benefits, to OSGLI, 212 Washington Street, Newark, N.J. 07102-2999.

III. PROBATE VS. NON-PROBATE ESTATE.

- A. Probate estate consists of property in the client's name only, with no contractual beneficiary designation, or property that would pass by intestacy if not for a will.
- B. Non-probate estate consists of property that passes due to some sort of beneficiary designation or by operation of law.
 - 1. Jointly owned property with a right of survivorship—including bank accounts, stocks, or realty.
 - 2. Totten Trusts – “in trust for” bank accounts that pass to beneficiary.
 - 3. Insurance proceeds.

4. Employee benefits that pass to beneficiaries –IRAs, pension plans, TSP, SBP for military members.
5. Property in Revocable/Irrevocable Inter Vivos Trusts.

IV. UNIFIED TRANSFER TAX SYSTEM

- A. Concept.
- B. Lifetime and Testamentary Transfers - aggregated and taxed at unified tax rates (I.R.C. § 2001).

Marginal Tax Rates

Minimum Rate

37% over \$675,000

Maximum Rate

55% over \$3,000,000

- C. Unified Credit.

Year	Unified Credit	Gross Estate Equivalent
1997	\$192,800	\$ 600,000
1998	\$202,050	\$ 625,000
1999	\$211,300	\$ 650,000
2000 and 2001	\$220,550	\$ 675,000
2002 and 2003	\$229,800	\$ 700,000
2004	\$287,300	\$ 850,000
2005	\$326,300	\$ 950,000
2006	\$345,800	\$1,000,000

V. THE FEDERAL ESTATE TAX.

- A. Scope. An excise tax on the transfer of property at death.
- B. Property Included in the Gross Estate (§§ 2033 - 2046). The gross estate is a combination of both the probate and non-probate estates. Determining the gross estate is essential to determine whether the client needs additional estate planning beyond a simple will.
 - 1. Property decedent owns at death.
 - 2. Life insurance.
 - 3. Annuities (e.g., SBP).
 - 4. Property transferred with certain "strings attached."
 - 5. Joint property.
 - a. The value of property decedent owned in joint tenancy with a right of survivorship, except to the extent it can be shown that the surviving co-tenant contributed to the acquisition of the property.
 - b. Special rules apply to certain joint interest held by spouses, in which each spouse will be considered as owning one-half interest in the joint property for estate tax purposes.
 - (1) The estate of the first spouse to die includes only one-half of the value of a "qualified joint interest" in property regardless of which spouse furnished the consideration for the property. For purposes of this provision, "qualified joint interest" is defined as any interest in property held solely by spouses as joint tenants with the right of survivorship or as tenants by the entirety. I.R.C. § 2040(b).

- (2) For gifts made to noncitizen spouses after July 14, 1988, the entire value of jointly held property is includible in the deceased spouse's estate, reduced by the portion of the property for which consideration was received. I.R.C. § 2056(d)(1)(B).
- 6. The value of all property with respect to which the decedent had a general power of appointment at death.
- 7. The value of certain transfers of life insurance by the insured; releases or exercises of general powers of appointment; and releases of certain powers in property interests retained from previous inter vivos transfers (within three years before death).
- 8. How much is too much?
 - a. Single client. Someone with over \$675,000 in a gross estate would benefit from additional estate tax planning.
 - b. Married client. Consider the **combined gross estate** of the married couple in figuring the \$675,000 limit.
 - c. Decision is the client's after full disclosure of the limitations of a simple will versus the other estate planning options. If a client wants a simple will consider having them sign a memo to the effect they were counseled on the limitations and agree to have you draw up a simple will.

C. Deductions from the Gross Estate (I.R.C. §§ 2051- 2056).

1. Expenses and indebtedness (I.R.C. § 2053).

2. Losses (I.R.C. § 2054).

3. Charitable bequests (I.R.C. § 2055).

4. Marital deduction (I.R.C. § 2056).

a. Eligibility.

(1) U.S. citizen spouses get an unlimited marital deduction.

(2) Non-U.S. citizen spouses do not get a marital deduction.
(However, can set up a Qualified Domestic Trust - § 2056A).

b. Effects.

(1) Any amount given during life (I.R.C. § 2523) or at death (I.R.C. § 2056) to a surviving U.S. citizen spouse escapes federal estate tax at decedent's death.

(2) Tax deferral for survivor's lifetime.

(a) The unlimited marital deduction for a citizen spouse permits the first spouse to die to pass his or her entire estate to the surviving spouse without any federal estate tax being due.

(b) At the surviving spouse's death, however, a federal estate tax will be due on whatever property the surviving spouse still owns or has the right to benefit from.

- (c) Because the property passing under the marital deduction will be diminished by the estate taxes payable at the later death of the second spouse, some planning may be appropriate.

D. Additional Federal Estate Tax Rules.

1. Inherited property is not income to the recipient.
2. Inherited property gets a stepped-up basis.

VI. ESTATE PLANNING FOR SERVICE MEMBERS.

A. When is more detailed estate planning necessary?

1. Gross estate > unified credit.
2. Non U.S. spouse.
3. “Mixed or blended” families.
4. Minor children or a disabled child.

B. “Legal assistance may be provided on other aspects of estate planning based on the availability of expertise and resources.” – *As a supervisor, where will you draw the line?*

VII. EXECUTION OF THE WILL.

A. Will Execution Procedure (See Appendix A.)

1. Attorney must supervise entire execution ceremony in the Army under AR 27-3.
2. The attorney (draftsman) will include his name, rank, and state of admission are indicated on the document. AR 27-3, para. 3-6b(2). (The attorney may have to provide testimony in a will contest or construction proceeding.)
3. Testator should orally declare document to be last will and testament.
4. Testator should sign at the end of the will proper in front of all witnesses.
5. Execute one will (not copies) and do not permit alterations.
6. Do not ever remove staples or take apart will and re-assemble.

B. Witnesses.

1. Use at least two young, disinterested witnesses. The attorney drafting the will can be one of the witnesses.
2. Avoid mass will executions and having deploying soldiers serve as witnesses if at all possible.
3. All witnesses should sign the will and self-proving affidavit in presence of the testator and of each other in an attestation clause after the testator's signature.

4. Self-Proving Affidavits.

- a. Only go to due execution.
- b. They will not avoid a contest on the lack of testamentary capacity, undue influence or fraud.
- c. In the event testimony of witnesses will be necessary, or will you find the military witnesses?
- d. Military Testamentary Instruments (See Appendix B).

C. Debriefing Clients.

- 1. Advise the client where to safekeep the will. Make it very clear to the client not to keep the will with him.
- 2. Explain circumstances and situations where updating the will would be beneficial.
- 3. Explain how to revoke the will and caution about unintentional revocation.
 - a. Revocation by Operation of Law.
 - (1) Marriage.
 - (2) Divorce.
 - (3) Birth of child.

b. Intentional Revocation

- (1) Destruction with intent to revoke.
- (2) Revocation by subsequent will or document executed with same formality as will.
- (3) The client may not always desire to destroy a previous will when executing a new one. Can be important to show intent or plan.

4. Explain the termination of the attorney-client relationship.
5. Explain that copies are not kept in the legal assistance office.
6. Allow only executed wills to leave your office and execute only one document.

VIII. CONCLUSION.

APPENDIX A

STANDARD OPERATING PROCEDURE FOR EXECUTING WILL

The following, or a procedure covering substantially the same points, is recommended as standard operating procedure with respect to the execution of wills:

- a. If the will consists of more than one page, the pages should be fastened together securely. The will should specify the exact number of pages of which it consists. This page numbering should not include the self-proving affidavit, which is not part of the will.
- b. The testator should read the will in its entirety and the legal assistance attorney should ensure that the testator understands the terms of the will.
- c. The testator and two persons who have no interest, vested or contingent, in the property disposed of by the testator's will or in the testator's estate in the event of intestacy, along with the legal assistance attorney supervising the execution of the will, should be in a room from which everyone else is excluded, and should remain therein until the execution is completed.
- d. The legal assistance attorney supervising the execution of the will should ask the testator the following question: "Do you (state the name of the testator) declare in the presence of (name the witnesses) that the document before you is your will, that you have read the document, that you understand the document, and that the document expresses your desires as to the disposition of the property referred to therein upon your death?" The testator should answer "yes" and the answer should be audible to the two mentioned witnesses. The legal assistance attorney should also ask if the testator is executing the document voluntarily, without any duress or coercion. The testator should again make an audible "yes" response.
- e. The testator should initial or sign on the margin of each page of the will. This is done for purpose of identification and to prevent the subsequent substitution of pages. The testator should then sign his or her name at the end of the will. The three witnesses should be standing or sitting so that all can see the testator sign.
- f. The legal assistance attorney supervising the execution of the will should then ask the testator the following question: "Do you request (names of witnesses) to witness the signing of your will?" Again the testator should answer "yes", and the answer should be audible to the three mentioned witnesses.
- g. The legal assistance attorney should ask the witnesses if the testator appears to be of sound mind, to understand the nature of his or her actions, and to be under no duress or coercion.
- h. One of the witnesses should then read aloud the attestation clause.
- i. Each witness should declare that the attestation clause is a correct statement.
- j. Each witness should then sign his or her name in the place provided for the signatures of the witnesses following the attestation clause. As each witness signs, the testator and the other two

witnesses should be so placed that each one can see the witness sign. The witness should place his or her full address and social security number opposite the signature. If the witness is in the military service, grade should also be included opposite the signature.

APPENDIX B

H.R.4205

Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Placed on the Calendar in the Senate)

SEC. 541. RECOGNITION BY STATES OF MILITARY TESTAMENTARY INSTRUMENTS.

(a) IN GENERAL- Chapter 53 of title 10, United States Code, is amended by inserting after section 1044c the following new section:

`Sec. 1044d. Military testamentary instruments: requirement for recognition by States

`(a) TESTAMENTARY INSTRUMENTS TO BE GIVEN LEGAL EFFECT- A military testamentary instrument--

`(1) is exempt from any requirement of form, formality, or recording before probate that is provided for testamentary instruments under the laws of a State; and

`(2) has the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is presented for probate.

`(b) MILITARY TESTAMENTARY INSTRUMENTS- For purposes of this section, a military testamentary instrument is an instrument that is prepared with testamentary intent in accordance with regulations prescribed under this section and that--

`(1) is executed in accordance with subsection (c) by (or on behalf of) a person, as a testator, who is eligible for military legal assistance;

`(2) makes a disposition of property of the testator; and

`(3) takes effect upon the death of the testator.

`(c) REQUIREMENTS FOR EXECUTION OF MILITARY TESTAMENTARY

INSTRUMENTS- An instrument is valid as a military testamentary instrument only if--

`(1) the instrument is executed by the testator (or, if the testator is unable to execute the instrument personally, the instrument is executed in the presence of, by the direction of, and on behalf of the testator);

`(2) the instrument is executed in the presence of a military legal assistance counsel acting as presiding attorney;

`(3) the instrument is executed in the presence of at least two disinterested witnesses (in addition to the presiding attorney), each of whom attests to witnessing the testator's execution of the instrument by signing it; and

`(4) the instrument is executed in accordance with such additional requirements as may be provided in regulations prescribed under this section.

`(d) SELF-PROVING MILITARY TESTAMENTARY INSTRUMENTS- (1) If the document setting forth a military testamentary instrument meets the requirements of paragraph (2), then the signature of a person on the document as the testator, an attesting witness, a notary, or the presiding attorney, together with a written representation of the person's status as such and the person's military grade (if any) or other title, is prima facie evidence of the following:

`(A) That the signature is genuine.

`(B) That the signatory had the represented status and title at the time of the execution of the will.

`(C) That the signature was executed in compliance with the procedures required under the regulations prescribed under subsection (f).

`(2) A document setting forth a military testamentary instrument meets the requirements of this paragraph if it includes (or has attached to it), in a form and content required under the regulations prescribed under subsection (f), each of the following:

`(A) A certificate, executed by the testator, that includes the testator's acknowledgment of the testamentary instrument.

`(B) An affidavit, executed by each witness signing the testamentary instrument, that attests to the circumstances under which the testamentary instrument was executed.

`(C) A notarization, including a certificate of any administration of an oath required under the regulations, that is signed by the notary or other official administering the oath.

`(e) STATEMENT TO BE INCLUDED- (1) Under regulations prescribed under this section, each military testamentary instrument shall contain a statement that sets forth the provisions of subsection (a).

`(2) Paragraph (1) shall not be construed to make inapplicable the provisions of subsection (a) to a testamentary instrument that does not include a statement described in that paragraph.

`(f) REGULATIONS- Regulations for the purposes of this section shall be prescribed jointly by the Secretary of Defense and by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Department of the Navy.

`(g) DEFINITIONS- In this section:

`(1) The term 'person eligible for military legal assistance' means a person who is eligible for legal assistance under section 1044 of this title.

`(2) The term 'military legal assistance counsel' means--

`(A) a judge advocate (as defined in section 801(13) of this title); or

`(B) a civilian attorney serving as a legal assistance officer under the provisions of section 1044 of this title.

`(3) The term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and each possession of the United States.'

(b) CLERICAL AMENDMENT- The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 1044c the following new item:

`1044d. Military testamentary instruments: requirement for recognition by States.'